STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Markey, Cavanagh, R.P. Griffin)

DAVID SANCHEZ,

Plaintiff-Appellant/
Cross-Appellee

S Ct No 123114

vs.

Ct App No 238003

EAGLE ALLOY, INCORPORATED (self-insured) and SECOND INJURY FUND (Dual Employment Provisions),

WCAC No. 00-0248

Defendants-Appellees/
Cross-Appellants.

ALEJANDRO VAZQUEZ,

S Ct No 123115

Plaintiff-Appellant
Cross-Appellee,

vs.

Ct App No 239592

EAGLE ALLOY, INC. (Cambridge Integrated Services Group),

WCAC No. 01-0182

Defendants-Appellees/
Cross-Appellants.

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PLAINTIFF-CROSS-APPELLEES' CORRECTED JOINT BRIEF

ORAL ARGUMENT REQUESTED

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1 WDCA = Workers Disability Compensation Act, MCL 418.xxx

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Plaintiffs/Cross-Appellees do not object to Defendant's Statement of Questions Presented (though they prefer their own statement).

COUNTERSTATEMENT OF FACTS

Plaintiffs incorporate by reference the Statement of Facts contained in Plaintiffs' Corrected Joint Brief on Appeal.

As for Defendant/Cross-appellant's statement of facts, three comments:

1. Plaintiff Sanchez testified that he obtained a California driver's license after passing a driver's test (146a). There is no record support for Defendant's claim that obtaining that license was somehow fraudulent.

2. While emphasizing that Plaintiff Vazquez could not be offered favored work once his undocumented status was discovered, Defendant's statement omits the crucial admission by its agent that it had a policy of not offering favored work to workers who have been terminated (as Vazquez was before Defendant learned of his undocumented status) (44b-45b).

3. The Appendices prepared by Defendant Eagle Alloy and Plaintiff-Appellants have the same pagination up to page 42a, but diverge thereafter.

COUNTERARGUMENT

I. UNDOCUMENTED ALIENS ARE COVERED BY MICHIGAN'S WORKERS COMPENSATION ACT[2]

A. "ALIEN" INCLUDES UNDOCUMENTED ALIENS

Defendant's comparison of minors to aliens, if anything, confirms that the Legislature did not intend to exclude illegally employed aliens from the Act's coverage. As originally enacted, the Workers Compensation Act defined "employe" as

> Every person in the service of another, under any contract of hire...*including aliens*, and also including *minors who are legally permitted to work* under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employes... 1912 PA 10 (extra sess.) Pt. I, Sec. 7 (emphasis added).

Defendant argues that "alien" implicitly excludes illegally employed aliens. However, by that reasoning, "minors" implicitly excludes illegally employed minors. If that were so, a legislature intending to cover only *legally* employed minors needed only to say "and also including minors," thus making the limitation "who are legally permitted to work" redundant. The fact that the Legislature did not consider the limitation redundant (plus the rule that no parts of a statute are to be dismissed as surplusage) shows that the Legislature understood what Defendant pretends not to: that the word "minors" (like the word "aliens"), if not expressly limited, covers both legally and illegally employed

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[2] This responds to Argument I of Defendant/Cross-Appellant's brief, and supplements Arguments I and II of Plaintiffs' Joint Brief on Appeal.

members of that class.

Moreover, adding a "legal employment" limitation for minors but not for aliens shows that the legislature did not intend to limit coverage to legally employed aliens. *Evans v U S Rubber Co*, 379 Mich 457, 461 (1967) (statutory clauses using different language presumed to mean different things).

The differing treatment of aliens and minors also underscores the illegitimacy of what Defendant seeks: if "aliens" were construed as meaning only legally employed aliens, the result would be to add a limitation ("who are legally permitted to work") that the Legislature *expressly intended to apply only to minors*. The courts are not authorized to thus amend statutes.

The simple fact is that, because the statute covers "aliens" without limitation, there is no legal or grammatical justification for limiting that term to legally employed or documented aliens. *Correa v Waymouth Farms*, __ Minn __, 664 NW2d 324 (2003) (By expressly including "aliens," plain language of worker's compensation act covers undocumented aliens).

B. A CONTRACT OF HIRE NEED NOT BE LEGAL

The "minor" analogy also belies Defendant's argument that "contract of hire" is implicitly limited to *legal* contracts of hire. If that were true, illegally employed minors would have been excluded without the need for any express language on the point, and the express limitation to minors "who are legally permitted to work" would have been

unnecessary.

C. ALLOWING AN EMPLOYER TO MITIGATE DOES NOT JUSTIFY OVERTURNING THE PLAIN LANGUAGE OF THE STATUTE

Defendant argues that it is unfair to fix workers compensation liability on an employer who, because of the prohibition on hiring undocumented aliens, is unable to mitigate by providing favored work to the worker.[3] This argument proves too much:

1. An employer is also denied the ability to provide favored work to a worker so disabled that he can't handle even light work; should the employer then be relieved of workers compensation liability? The Appellate Commission says not. *Beeler v Holly Area Schools,* 1995 WCACO 1892, 1894 (No. 397, Sept. 22); *Cooper v Town & Country Nursing Home,* 1994 WCACO 1910 (No. 437, Aug. 12).

2. Sometimes injured workers experience nonwork-related maladies that preclude even favored work. Though the employer's inability to mitigate in such a case is not the employer's fault, the inability to mitigate does not excuse the employer's statutory duty to pay compensation. *Powell v Casco Nelmor Corp,* 406 Mich 332, 352 (1979); *Lynch v Briggs Mfg Corp,* 329 Mich 168, 172 (1950).

3. WDCA 301(5)(a) recognizes that there may be situations in which the employer is

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[3] This argument is not even applicable to Vazquez, since Defendant's policy of not providing favored work to terminated workers would have prevented his rehiring even if it were legal to do so.

willing to provide work within the injured worker's capabilities, yet the worker has "good and reasonable" cause to refuse same (which has been held to include moving away, personal reasons, etc.). Yet WDCA 301(5)(a) expressly precludes denial of wage-loss benefits in such a situation.

4. Finally, while large employers can often find sheltered work for injured employees, smaller businesses do not always have that capability. Although this might seem "unfair" to the smaller business, is it any reason to evade the duty to compensate the worker for on-the-job injuries?

In short, the break employers get for providing favored work is a privilege, not a right, which may be denied in any number of cases. Consequently, the mere fact that employer cannot offer favored work to an undocumented alien is no authority for ignoring the express provisions of the Act entitling such workers to compensation.

D. FEDERAL LAW DOES NOT PREEMPT

Recognizing that centralized government is a formula for tyranny, America's founders created a system of checks and balances, not only among branches of government, but also between the Federal and state governments. To maintain that balance, there is a presumption against Federal preemption of state laws: preemption will be found only if Congress "unmistakably" so ordains, or if the nature of the subject admits of no other conclusion. *DeCanas v Bica,* 424 US 351, 356, 357; 47 L Ed2d 43; 96 S Ct 933 (1976). Thus, although Congress has undoubted power to regulate immigration, the immigration

laws do not preempt state laws which regulate employment (including discrimination and workers compensation) even though such laws affect aliens. *DeCanas* at 424 US 355, 356.

Although the 1986 Immigration Reform & Control Act (IRCA) regulates employment more than previous immigration acts, nowhere does it say or even imply that states are prohibited from granting workers compensation to undocumented aliens injured on the job. On the contrary, 8 USC 1324a(h)(2) provides,

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ... unauthorized aliens.

The quoted section preempts only "sanctions," meaning things meant to punish. Workers compensation is not a sanction imposed on employers: it is indemnity to an injured worker, a substitute for the damages the injured worker was formerly entitled to recover at common law. *Smith v Pontiac Motor Car Co,* 277 Mich 652, 654 (1936). Consequently, workers compensation liability is not a "sanction" preempted by the quoted clause. *Dowling v Slotnik*, 244 Conn 781, 793; 712 A 2d 396, 403 (1998).

Moreover, as the last clause of the quoted statute shows, IRCA was not meant to preempt *all* sanctions on employers, but only sanctions *which turn on whether the worker is unauthorized.* Thus, while the statute would preempt a state law imposing a fine for employing an unauthorized alien, a state law imposing a fine on employers for workplace safety violations would not be preempted, even if the violation involved an unauthorized

worker, since the sanction would not turn on whether the employee was unauthorized. *Cf.* H Report 99-682(I) at 1986 USCCAN 5649, 5662: IRCA does not "undermine or diminish in any way labor protections in existing law."

Congress expressly took up the preemption question, preempted certain types of laws, but did not purport to preempt the type of law involved here. Under the rule *expressio unius est exclusio alterius,* this establishes that IRCA does not preempt workers compensation laws. *Dowling v Slotnik, supra*; *The Reinforced Earth Co v WCAB*, 749 A2d 1036, 1038 (Pa Cmwlth 2000); *Ruiz v Belk Masonry Co*, 559 SE 2d 249, 252 (NC App 2002); *Safeharbor Employer Services v Cinto-Velazquez,* __ So 2d __ (Fla App 2003).

E. *HOFFMAN PLASTIC* IS IRRELEVANT

By a 5-4 decision, the U.S. Supreme Court in *Hoffman Plastic Compounds v NLRB*, 535 US 137, 152 L Ed 2d 271, 122 S Ct 1275 (2002), acknowledged that the National Labor Relations Act (NLRA) covers illegal aliens, but reversed a back pay award to an illegal alien who was fired for engaging in union activity. The majority argued that such an award conflicts with the policies of IRCA, and would reward criminal conduct by illegal aliens.

However, the *Hoffman* majority's view of Federal immigration policy was strangely one-sided, skating over the rather obvious point that denying backpay to illegal aliens gives an employer a strong incentive to hire illegal aliens. If, in addition, employers of illegal aliens don't have to pay them workers compensation either, hiring of illegal aliens

starts looking like a good business proposition. *Dowling v Slotnik*, supra at 712 A 2d 411; *Fernandez-Lopez v Jose Cervino, Inc*, 288 NJ Super 14; 671 A 2d 1051, 1054 (1996); *Mendoza v Monmouth Recycling Corp*, 288 NJ Super 240; 672 A 2d 221, 225 (1996).

Apart from that, NLRA cases provide a poor analogy to workers compensation cases. For one thing, the *Hoffman* court was faced with the dilemma of weighing apparently contradictory policies of two Federal statutes: the NLRA, designed to punish employers who interfere with unionization, and IRCA, designed to curtail illegal immigration. By contrast, the alleged conflict in the case at bar is between a Federal statute which, under the guise of regulating the borders, purports to regulate conduct within states, and state workers compensation acts, which the U.S. Supreme Court has already held is a matter of state concern, even if it affects noncitizens and aliens. *Pacific Employers Ins Co v Industrial Accid Comm'n*, 306 US 493, 83 L Ed 940, 59 S Ct 629 (1939) (California has right to grant worker's compensation to noncitizen); *Madera Sugar Pine Co v Industrial Accid Comm'n*, 262 US 499, 502; 67 L Ed 1091; 43 S Ct 604 (1923) (California's interest in having its industry pay its own way justifies granting worker's compensation benefits to Mexican nationals). In short, there are Federalism concerns presented by the case at bar that were absent in *Hoffman Plastic.*

Moreover, NLRA backpay serves a different purpose than workers compensation wage-loss benefits. Since NLRA backpay is an equitable remedy designed primarily to punish a transgressing employer, comparing the moral culpability of the parties is highly

relevant to whether backpay is appropriate. By contrast, workers compensation is a no-fault system, which mandates benefits for injured, disabled workers even if the employer is wholly innocent and the worker is guilty of misconduct (except in specified situations).

Speaking of specified situations, in NLRA cases, it is the courts who have fashioned disqualifying misconduct rules, which is what enabled the U.S. Supreme Court to hold that illegal conduct by an alien justifies denial of backpay, despite lack of express statutory provisions. By contrast, at least since 1982, disqualifying misconduct in workers compensation cases has been purely statutory (e.g.,WDCA 301(5), 361(1), 431), leaving a court without authority to deny workers compensation benefits in a case not falling squarely within one of the statutory disqualification provisions.

The Court has refused to follow U.S. Supreme Court authority when there are even minor differences between the wording of the Michigan and Federal statutes. *Chambers v Trettco*, 463 Mich 297, 314-315 (2000). Perforce, U.S. Supreme Court authority is immaterial when dealing with entirely different statutes, involving different policies, and presenting different issues.

F. PUBLIC POLICY CANNOT OVERRIDE THE PLAIN LANGUAGE OF THE STATUTE

Defendant relies on Commissioner Przybylo's opinion, which starts off with a discussion of the need to weigh competing "public policies." This approach is immediately suspect, since it ignores the Supreme Court's direction that, when construing

a statute, one starts with the words of the statute. *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 748 (2002). It may be inferred that the WCAC majority (and Defendant) start at the wrong end of the analysis because, if they started at the right end (the words of the statute), it would not lead where they want to go.

At any rate, "public policy" is not pulled out of a hat: it must be evidenced by statutes or constitutions declaring the policy. However, the same statutes that *evidence* public policy *limit* public policy.

Thus, while the Workers Compensation Act could have simply stated that anyone who does something illegal doesn't get compensation, the Legislature, realizing that such a broad-brush approach would create injustice, opted for disqualifying workers only for *specific* things in *specific* situations. In other words, since the Act creates no *general* policy against compensating wrongdoers, asserting such a policy cannot justify denial of benefits to workers for wrongdoing that does not clearly fit within one of the *specific* disqualifying situations created by the statute.

So also, while IRCA reflects a public policy against employment of undocumented aliens, that policy is far from absolute. For one thing, although Congress could have made employment of undocumented aliens illegal, period, Congress instead made only *knowing* employment of such aliens illegal. More pertinently, by making *employers* but not *employees* criminally liable for illegal employment of undocumented aliens, Congress disclaimed any intent to punish the undocumented alien. This is *the exact opposite* of the

"public policy" applied by Commissioners Przybylo, Martell and Skoppek, who would impose all the burdens of violating IRCA on the worker, while *giving the employer a pass.*

If we were truly concerned with applying public policy as expressed in IRCA, we would impose workers compensation liability on the transgressing employer, thus assuring, consistent with IRCA, that the employer, not the employee, suffer the consequences of illegal employment. Indeed, following Commissioners Przybylo *et al.* would interfere with IRCA, by giving employers a strong incentive (freedom from workers compensation liability) to violate IRCA by hiring undocumented aliens. *Dowling v Slotnik*, *supra* at 712 A 2d 411; *Fernandez-Lopez v Jose Cervino, Inc*, *supra*, at 288 NJ Super 20, 671 A 2d 1054; *Mendoza v Monmouth Recycling Corp*, *supra*, at 672 A 2d 225.

Even on the general question of whether it is bad, from a public policy standpoint, to employ undocumented aliens, the Federal government is divided. Congress currently prohibits such employment (under certain circumstances, and with limited consequences), but President Bush thinks differently. At his press conference on December 15, 2003, the President was asked whether he was now considering returning to the relaxed immigration policies he was proposing before "9/11." He replied, "This administration wants to follow a policy of matching any willing employee to any willing employer." The President expanded on that concept on January 7, 2004. Echoing the U.S. Chamber of Commerce, President Bush announced that he was proposing legislation to permit undocumented aliens currently in the country to apply for three-year work permits.

President Bush lamented the fact that such aliens "contribute to our economy but enjoy no legal protections." He stated that ill treatment of "nondocumented" alien workers is "not the American way."

While the policies of Federal immigration law are at best equivocal (and at any rate immaterial to construction of Michigan's Workers Compensation Act), there are some *applicable* policies that justify awarding workers compensation benefits to undocumented aliens.

First, the whole point of workers compensation is that costs resulting from on-the-job injuries are a cost of doing business, which should be borne by the industry and employers who profit from the worker's labor. *Smith v Pontiac, supra* at 277 Mich 654; *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8, 13 (1915). Permitting employers to reap the benefit of the undocumented alien's labor, without requiring the employer to bear the costs of such workers' injuries, would (contrary to the stated policy) give employers an undeserved windfall.

Another purpose of workers compensation acts is to promote job safety: if an employer does not have to pay for on-the-job injuries, the employer has little incentive to create a safe workplaces. Denying workers compensation to undocumented aliens would therefore make workplaces less safe, not only for the undocumented alien, but also for the U.S. citizens working alongside him. *Mendoza v Monmouth Recycling Corp, supra,* at 672 A 2d 225.

In short, denial of compensation to undocumented aliens would contravene, not only several public policies overlooked by the WCAC majority (a safe workplace, imposing costs of injuries on the industry profiting from the worker's labor), but also the very policies identified by the majority (since it would encourage employers to violate IRCA).

Ultimately, though, Defendant's appeal to public policy is pointless. By its plain language, the workers' compensation act covers all aliens (documented or not) under all contracts of hire (legal or not). No public policy can override the plain language of a statute. *Robertson v Daimlerchrysler Corp, supra* at 465 Mich 759.

II. MISREPRESENTATIONS TO OBTAIN WORK HAVE NO EFFECT ON COMPENSATION[4]

A. THE EXISTENCE OF A LIMITATION FOR MINORS USING FALSE DOCUMENTATION TO OBTAIN WORK, BUT NOT FOR OTHER WORKERS, SHOWS THAT NO SUCH LIMITATION WAS INTENDED

The "minor" analogy also contradicts Defendant's argument that Plaintiffs' misrepresenting their Social Security numbers somehow vitiates the contract of hire.

Because of various untoward effects of the Act as originally worded (including continuing tort liability for employers of illegally employed minors[5]), in 1927 the

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[4] This responds to Defendant/Cross-Appellant's Argument II, and supplements Argument III in Plaintiffs' Joint Brief on Appeal.

[5] *Kruczkowski v Polonia Pub Co*, 203 Mich 211 (1918); *Grand Rapids Trust Co v Peterson*

Legislature amended the definition of "employee" to include

> Every person in the service of another, under any contract of hire...including aliens... and also including minors [who are legally permitted to work under the laws of the State] who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees: *Provided, that any minor between the ages of sixteen and eighteen years whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits, or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act.* 1927 PA 162, 1929 CL 8413 (deleted language in brackets; added language italicized).

The amendments

- removed the limitation of the Act's coverage to legally employed minors (thus protecting employers from tort suits by illegally employed minors[6]);
- added a penalty of double compensation in cases of illegal employment of minors; and
- limited that penalty to cases where the minor obtained work using false documents.

The last provision is most relevant to the case at bar. It shows that, when the

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Beverage Co, 219 Mich 208 (1922); *Kucinski v City Laundering*, 242 Mich 352, 354 (1928). Although Defendant lifts language in these cases out of context to bolster its argument that contracts must be legal, the holding of these cases is plain: employers could be sued by illegally employed minors because the Act expressly limited the definition of "employee" so as to exclude illegally employed minors. Whether such minors could have sued absent that exclusion was a question not presented to the courts. These cases do, however, suggest a legal consequence of excluding undocumented aliens from the Workers Compensation Act.

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Thomas v Morton Salt Co, 253 Mich 613 (1931); *Carlton v Parker Dairy Corp*, 367 Mich 23 (1962).

Legislature wants to limit compensation for workers using false documentation to obtain work, it knows how to do so. The fact that the Legislature created no such clause for *adult* workers using false documentation to obtain work shows that compensation was not intended to be limited in the latter case. Moreover, an express clause governing illegal documentation in the case of minors underscores that it would be judicial legislation for a court to invent a similar clause for undocumented alien workers.

B. AS A MATTER OF CONTRACT LAW, MISREPRESENTATIONS DO NOT NEGATE WORKERS COMPENSATION LIABILITY

Defendant argues that there is no valid contract of hire because of the misrepresentations Plaintiffs used to obtain their jobs. However, merely showing a misrepresentation does not entitle an employer to get out from under a contract.

For one thing, the misrepresentations must be material; i.e., would have made a difference had the employer known the truth. Although Defendant self-servingly claims that it would not have hired Plaintiffs had it known they were undocumented, that claim is belied by defendants having 63 (out of 250) employees on its payroll lacking valid Social Security numbers. If this does not show that Defendant must have known it was hiring undocumented workers, it at least proves that Defendant *did not care* whether the workers were documented or not. Not caring whether a representation is true or not is about the definition of "immaterial."

Even assuming, for the sake of argument, that the misrepresentations were material,

that would render the contract at most avoidable. However, a contract may not be avoided or rescinded unless the victim of the fraud or breach can restore the *status quo ante. Smith v Highland Park State Bank,* 309 Mich 226, 231 (1944).

For example, in land contract cases, a purchaser who was materially misled about the premises may be entitled to rescind the contract. However, one seeking to rescind must also restore the *status quo ante*, which means returning the premises *in the same condition*, less normal wear and tear. If the premises have deteriorated more than that while in the purchaser's possession, he must compensate the vendor to that extent. *Schimke v Scott*, 361 Mich 654, 660 (1960) ("the right to rescind requires the defrauded party to restore what he or she has received, *with allowance for any part that cannot be restored*" (emphasis added).

If a worker's property interest in himself is of no less value than a purchaser's interest in premises, then when an employer rescinds an employment contract for fraud, the employer has a duty to return the worker in the same condition. If (because of an intervening injury to the worker) the employer is unable to return the worker in the same condition, the employer has a duty to pay for the damage to the property (i.e., the worker) as exceeds normal wear and tear. The measure of damage to a worker is the medical expenses and loss of earning capacity resulting from the damage; which, not coincidentally, corresponds with what workers' compensation pays.

In short, standard contract principles tell us that an employer is not entitled to rescind

the employment contract for fraud without paying workers compensation for injuries to the worker. Anything less would unjustly enrich the victim of a contract breach, by allowing the victim to rescind without fulfilling his duty to restore the status quo ante (or its equivalent in money).

C. CONCLUSION

Ultimately, though, it is irrelevant how contract law would analyze this situation, since the Workers Compensation Act is a statutory system with rules that supersede contract principles. Consequently, fraud in the inducement will affect workers compensation benefits only when the Act expressly authorizes it. *Halfacre v Paragon Bridge Co*, 368 Mich 366, 372 (1962) (fraudulently stating one's age does not preclude double compensation, since statute specifies that only false documentation has that effect). This is not a case of a minor using false documentation to get work, nor of a worker concealing the existence of an occupational disease that later disables him. Since those are the only cases in which the Act limits compensation due to fraud in the inducement, there is no legal basis for disqualifying Plaintiffs for any misrepresentations they made to get work.

III. WDCA 361(1) DISQUALIFICATION DOES NOT APPLY

Argument IV in Plaintiffs' Joint Brief on Appeal sufficiently answers Defendant/Cross-Appellants' Argument III. We will simply add that defining "crime" to include Federal crimes does little to further the rule of law. At the time the relevant

language was added to the Act, it was not illegal for an undocumented alien to work here. At the present time, it is illegal for an employer to knowingly employ such an alien. However, if President Bush's proposals are adopted, it will again become legal. In adopting the language it did, did the Michigan Legislature really intend that a worker's right to compensation would change with every shift of the political winds in Washington?

RELIEF REQUESTED

For the foregoing reasons, Defendant's Cross-Appeal should be denied.

Respectfully submitted,

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